

No 327

Office - Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942

**FRED FISHER MUSIC CO. INC. and GEORGE
GRAFF, Jr.,**

Petitioners,

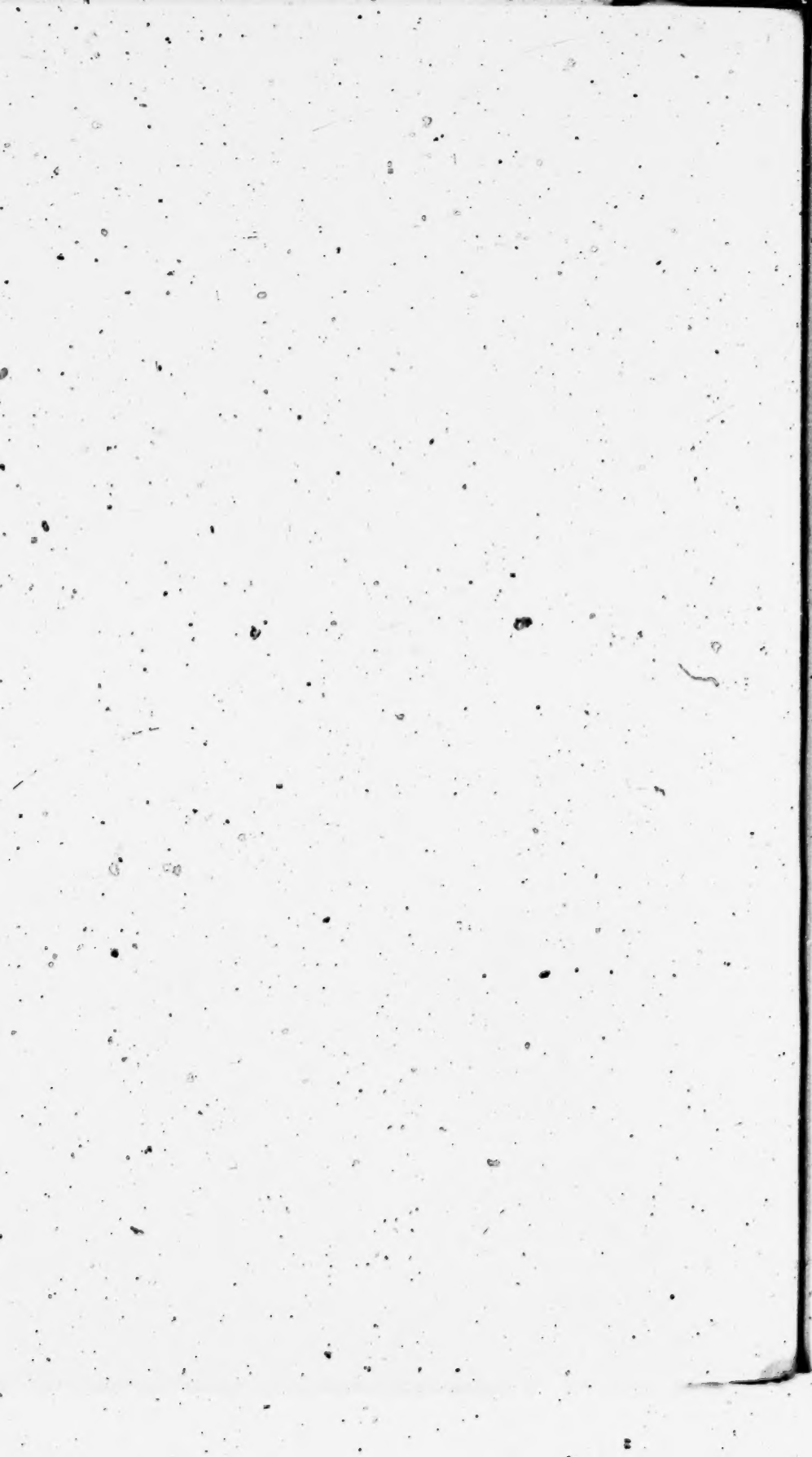
against

M. WITMARK & SONS,

Respondent.

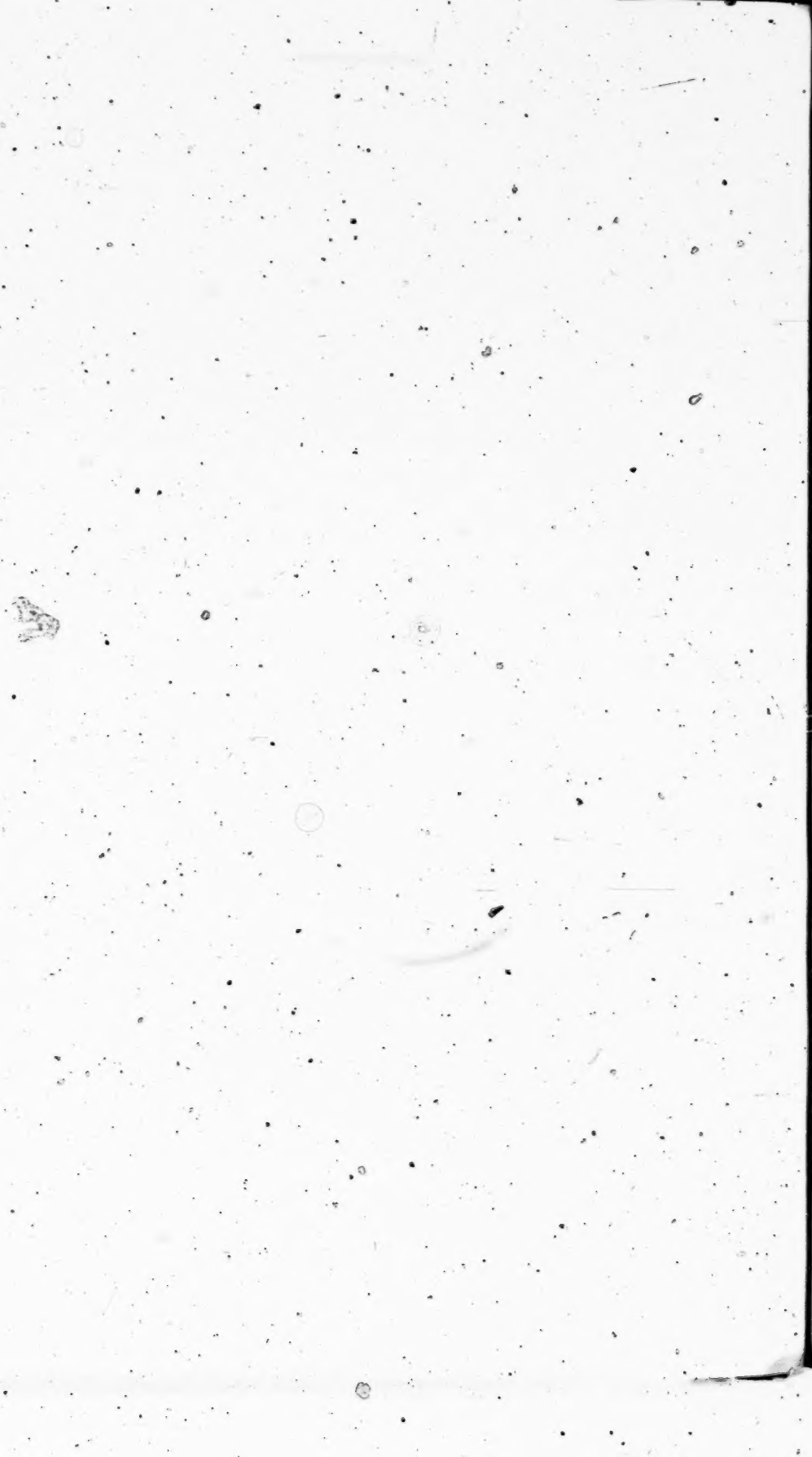
PETITIONERS' REPLY BRIEF

**ARTHUR GARFIELD HAYS,
Solicitor for Petitioners.**



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Respondent urges that certiorari should not be granted because the order sought to be reviewed is interlocutory. We indicated in the petition our realization that this Court is reluctant to review cases which have not reached final judgment. The relief for which we ask is not lightly granted. The power does, however, exist, and where the question is one of public interest and general importance, this Court may, in the exercise of its discretion, review a case at any stage of the proceedings.

American Const. Co. v. Jacksonville Ry., 148 U. S. 372, at 385;

Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, at 258.

Respondent makes no attempt to deny that the question of law decided in the case at bar is one of public interest

and general importance. On the contrary, it speaks of the difficult problems "affecting the rights of authors, and of the public" which might be involved in a decision contrary to that which prevailed in the Court below. (Brief, p. 17).

The argument is advanced that the law is settled beyond controversy, and yet, we have the dissent of Judge Frank and the concession of the majority that:

"After 1909, it is true that some of the experts tended to hedge. Four treatises published after the new act went into effect state that probably an assignment can be enforced; but three others are fairly definite about it. Only one of those we have found seems to deny assignability" (R. 100-101).

The problem presented in this case is of importance not only to the petitioners and to the respondent, but to every author in the United States, to every purchaser of copyright, and to every user of copyrighted material. It affects not only contracts made in the past, but furnishes a guide for future conduct.

Especially because of the sharp divergence of opinion in the Court below, there remains, until this Court should speak, a continued uncertainty concerning the validity of contracts by which an author purports to sell his renewal rights in advance of the twenty-eighth year of copyright. Upon the ultimate decision of this Court rests the claim to ownership of renewal rights which have been sold or which may hereafter be conveyed.

As we stated in the petition, three cases have already been decided on the precedent established in the instant case.

In *Schwinn & Co. v. Veiller*, 43 Fed. Supp. 491, the playwright, Bayard Veiller, was directed to assign his renewed copyright in the play "WITHIN THE LAW" to a corporation which had been dissolved and whose corporate existence

was revived only after the commencement of the action. Judge Rifkin said (43 Fed. Supp. 491, at 494):

"The second prayer of the complaint is for a direction that defendant assign the renewal copyright to plaintiff. It raises the same issue as the Witmark case and has been settled for this Court by the Circuit Court of Appeals. *M. Witmark & Sons v. Fred Fisher Music Co., Inc.*, 2 Cir., 125 F. 2d 949, decided February 11, 1942. I am constrained, by the authority of that decision, to hold that plaintiff is entitled to a decree adjudicating that as against the defendant it is the owner of the renewal copyright."

See also:

G. Schirmer, Inc. v. Robbins Music Corp., et al.,
176 Misc. 578, 28 N. Y. Supp. (2d) 699;

Rossiter v. Vogel, U. S. D. C., So. Dist. of N. Y.,
June 30, 1942, not yet reported.

- One need but look at the shelves of a library, or at newspapers or magazines, or attend concerts and theatres, or to listen to the radio, to realize the wealth of material covered by copyright. New works are created day by day. Some of them will have a long life, others an early death. Most of them are covered by copyright. In many, if not in most instances, the copyrights have been, and will continue to be owned for the original term by the publishers and other entrepreneurs. It is important for them, as well as for authors, to know who controls the renewal privilege when it comes into being in the twenty-eighth year of the original term. It is likewise important that there be certainty in respect of the renewal copyrights in the many literary and artistic works which were created within the past quarter of a century. Is the beneficial ownership of the renewal privilege confined to the author, as Congress seems to have intended, or may it pass to a publisher under contract because Congress failed to make its intention clear? Until

the issue is ultimately decided by this Court, there can be no certainty, doubt will remain, and reasonable men may continue to differ on the question.

That type of doubt, as Judge Rifkin points out in *Selwyn & Co. v. Veiller*, 43 Fed. Supp. 491, caused a motion picture company to pay a substantial sum to an author to insure itself against the contingency that the courts might hold that the author, and not his assignee, was the true owner of the renewal copyright (43 Fed. Supp. 491, at 493). Whether it would have paid the same sum only for a quitclaim from the author's wife and son is, of course, conjectural.

Consequently, the circumstance that your petitioners may possibly defend at a trial on the theory that the contract lacked consideration adequate to make it enforceable in equity, is overshadowed by the larger principle involved. The question of interpretation of the statute strikes at the very heart of the respondent's cause of action. In the determination of this issue, there is no disputed question of fact. The making of the contracts is admitted, and for the purposes of this issue of law petitioners assume that the consideration was legally sufficient. If the statute be interpreted as we contend it should be, the litigation is to all intents and purposes at an end. As Judge Clark's opinion shows, it was to this specific issue that the arguments in the Circuit Court of Appeals were confined (R. 104).

Because of the general importance of the question and the public interest involved, we respectfully pray for the exercise of the Court's discretion, on the ground this is an extraordinary case. Petitioners and respondent are now symbols in a controversy, the scope of which transcends their private interests. The ownership of the song "WHEN IRISH EYES ARE SMILING" is important to

them individually. Of even greater importance is the control of the renewal privilege by authors on the one hand, or by copyright proprietors on the other. That effects literally thousands of people in the United States who make their living by writing and creating, or by publishing or utilizing copyrighted material.

We therefore pray that despite the interlocutory character of the order, certiorari be granted.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
Solicitor for Petitioners.